

message to draw from this survey is that 75 percent of the customers surveyed said that the 'main reason' they purchased PCS is because they sought a new or different mobile communications option, not a substitute for wireless service."⁵⁴ In all likelihood, the study significantly overstates the usage because it uses a skewed sample. The PCS subscribers were not randomly selected but rather consisted of a class of PCS users who responded to advertisements to participate in the study. This self-selection very likely means that the study included primarily or exclusively a certain class of users -- perhaps, for example, those with the most intense attitudes about their service. In any event, the study fundamentally suffers from having narrowed the group of people surveyed. In trying to assess the degree of substitutability between PCS and wireline, the relevant percentage of consumers perceiving their substitutability is the total market -- not just PCS subscribers.

Moreover, without public disclosure of all of the data received in response to the questions asked in the survey, the results of the survey cannot be meaningfully evaluated or credited. Most interesting would be data for the questions asked but not reported by the study. One highly significant question listed in the questionnaire but wholly absent from the submission: who pays for the mobile phone (company, personal or both). The responses to this question

⁵⁴ Shapiro and Hayes Dec. at 10.

The "qualitative" interviews indeed support this conclusion. Of the "representative" transcripts attached, all but four interviewees still maintain wireline service. Of the four who do not, one respondent was inconsistent as to whether he had in fact disconnected wireline service, one stated he had not subscribed to phone service in order to avoid outstanding phone bills owed to BellSouth from a prior address, one state that he stopped his wireline service because his friends ran up long distance bills, and another interviewee stated her view that if she did not use PCS, she would have a pager, apparently not even considering wireline service as an alternative.

would reveal and explain much about PCS users' motivation for subscribing; indeed it is very likely that any respondent who responds that someone else is paying for the service should have been rejected from the survey as a matter of sound polling.

Even without the answers, the questions themselves are sufficiently ambiguous as to put the results in question. For example, Sprint pointed out in the first response to the first Denk study that the category of subscribers "Subscribed to PCS for Initial Service Instead of Wireline" appears to be sufficiently broad as to include merely users who placed their PCS order before they placed the next phone call or office visit to subscribe to BellSouth's service. BellSouth's reply submission set forth the questions, but did not address the fundamental problem identified by Sprint: the question itself is poorly worded and ambiguous. As Sprint pointed out, the answers may reveal merely how so few people first coming to town or to a new address call a PCS company before they call the telephone company.⁵⁵ It is most interesting to note that another question that had been part of the first survey was actually dropped from the second: how many wireline lines the respondent has (in home or at business). Quite plainly, the quantitative question of how many wireline lines the respondent has should serve as a significant check on the qualitative responses to other questions. Without data from the first survey on this question, and without explanation for its elimination from the second survey, the inference is plain. BellSouth did not like the results.

⁵⁵ It could also reflect the delays new customers of BellSouth face between the time they place orders for wireline service and the time service is actually installed and/or turned up. Since 1987, US West Communications, Inc. has had FCC authority to provide interim CMRS service to customers who are waiting for provisioning of new wireline service. See Request of US West Communications, Inc. for a Limited Waiver of Section 22.903 of the Commission's Rules, Order, 11 FCC Rcd 10905 (1996). Customers using this CMRS service on an interim basis, however, do not represent customers "substituting" that service for wireline service.

The study disguises the complementarity of the services in other ways as well. For example, Table 4a shows the length of time PCS users have maintained their service. It states "most have had PCS for over three months, so it appears they have no intention of getting wireline service." But this is a complete *non sequitur* -- keeping PCS service simply does not reveal whether the PCS user may also subscribe to landline service.⁵⁶ Indeed, one might fairly question why the company did not simply include that question and ask the respondents directly. The absence of the question in fact allows the inference that the results would not have been the one desired by the study's sponsor.

With all these errors and biases, the Denk report still only concludes that 5% of PCS users have replaced their wireline service with PCS service. Even taking this percentage as correct, this would amount to only about 1,750 PCS subscribers in Louisiana -- representing about .07% of Louisiana telephone customers!⁵⁷

Moreover, the Denk survey stands in marked contradistinction with another survey touted publicly by BellSouth. That study, published on the Web, showed that the primary reasons given by wireless customers as their reason for subscribing all relate to the mobility of the service.⁵⁸

⁵⁶ See Shapiro and Hayes Decl. at 10-11. As explained by Shapiro and Hayes, the use of PCS as supplement to wireline service may generate additional minutes and thus actually increase the dependence on the wireline network. See *id.* at 6.

⁵⁷ BellSouth reports that there are approximately 35,000 PCS subscribers in the state, and 2.25 access lines in Louisiana (35,000 divided by 2.25 million = .07%).

⁵⁸ See "Five Million Strong for BSCC" press release dated July 25, 1997, published at <<http://www.com/b SCC/pr072597.html>>. The study reports percentages for the following "primary reasons for subscribing": "able to communicate in an emergency" "in touch while away from home or office" "personal safety" "make calls when late." *Id.* The study has been removed from BellSouth's website since its first 271 filing for Louisiana.

The study -- which is much more straight-forward than the Denk survey -- belies BellSouth's claim that wireless service can ordinarily be viewed as a substitute for local service.

Sprint is of course not suggesting here that PCS will never be able to provide a meaningful alternative to landline fixed telephone service. Through its ownership of Sprint PCS, Sprint is committed to investing the necessary capital and resources to allow PCS to realize its full economic potential. Currently, however, the unquestionably highest use of the wireless spectrum remains mobile services that are complements to, not substitutes for plain old telephone service.⁵⁹

BellSouth has itself stated this proposition most succinctly:

[T]he wireless industry would not jeopardize its mobile customer base (a segment growing at an estimated 30-40% per annum) by raising rates to mobile customers or decreasing quality as a result of providing fixed services to a relatively small and emerging segment.⁶⁰

BellSouth, by its own admission, cannot claim that PCS service providers are "competing provider[s]" at this time.

As described in its 1997 Annual Report to Shareholders, BellSouth's wireless strategy demonstrates the complementarity of the two services, noting that the company will build out its PCS service so that "when completed, our wireless service will be available to virtually all our wireline customers in our region."

⁵⁹ Consistent with the Commission's confidence in the economic efficiencies of auctioning spectrum, the market has determined that, for the time being anyway, the best and highest use of this scarce resource is mobile service.

⁶⁰ Amendment to the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, WT Dkt. No. 96-6, BellSouth Petition for Partial Reconsideration or Clarification at 3 (filed Sept. 30, 1996).

II. BELLSOUTH'S APPLICATION IS INSUFFICIENT ON ITS FACE TO MEET THE REQUIREMENTS OF SECTION 271(c)(2), THE COMPETITIVE CHECKLIST.

Section 271(c)(2) requires that a BOC applicant meet "each" of the checklist requirements. The failure to meet the requirements of any checklist item is fatal to a Section 271 application. As explained below, BellSouth has clearly failed to meet many checklist requirements.

At the outset, Sprint notes that there are numerous other deficiencies not discussed below that are implicated by the Supreme Court's review of the Iowa Utilities Board Order.⁶¹ The full import of the Eighth Circuit's decision, and the related mandamus order, has yet to be determined, either with respect to the Commission's jurisdiction under Sections 251 and 252, or its separate mandate under Section 271. The United States Court of Appeals for the D.C. Circuit has also strongly indicated its view that the FCC's Section 271 jurisdiction is independent of and unimpeded by Section 2(b) of the Act.⁶² Such issues include, *inter alia*, prices for unbundled elements, geographic deaveraging, the obligation of RBOCs to combine UNEs for competing carriers, and most favored nations obligations.

In light of the legal uncertainties, as well as the need for the Commission to reject this application on numerous other grounds, Sprint will not address this set of issues at this time. It should be noted, however, that BellSouth's strategy to enter the interLATA markets has been marked not simply with an attitude of 'doing the minimum' -- it has not even done that well. Its

⁶¹ See FCC v. Iowa Utils.Bd., 118 S.Ct. 879 (1998).

⁶² See SBC Comm. Inc. v. FCC, 138 F.3d 416-417 at 421 (D.C. Cir. 1998) (discussing inapplicability of section 2(b) and Louisiana PSC v. FCC, 476 U.S. 355 (1986)).

positions reflect a consistent refusal to comply with extant Commission directives with which it does not agree -- BellSouth is in essence acting as its own appeals court. Notwithstanding its protests that it has complied with FCC requirements, it continues to flout them in OSS, ISP reciprocal compensation, resale restrictions and other areas discussed below.

A. BellSouth Does Not Provide Competitors With Access To Its OSS That Is At Parity With The Access BellSouth Provides To Itself.

The FCC has found that a BOC must provide access to its OSS as part of its obligation to provide nondiscriminatory access to UNEs and to make service available for resale under the Section 271 checklist.⁶³ Thus, for OSS functions that are analogous to those that the BOC provides to itself, the BOC must offer access to CLECS that is equivalent to the access the BOC provides itself.⁶⁴ Where there is no BOC retail analog, the BOC must offer access that is sufficient to give an efficient competitor a meaningful opportunity to compete.⁶⁵

While BellSouth has made some progress in developing OSS interfaces, a great deal of work must still be done before it will meet the "nondiscrimination" and "meaningful opportunity to compete" standards. BellSouth has not even fixed many of the problems identified by the FCC in its two previous BellSouth Section 271 orders. Sprint enumerates below these unresolved problems. These obvious deficiencies obviate the need to even analyze the adequacy of OSS for maintenance and repair and billing.

⁶³ See Application of BellSouth Corporation, et. al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In South Carolina, Memorandum Opinion and Order, 13 FCC Rcd 539, at ¶¶ 83-85 (1997)("South Carolina Order"); Michigan Order at ¶ 132-33.

⁶⁴ See Michigan Order at ¶¶ 139-140.

⁶⁵ See id. at ¶ 141.

BellSouth must take the blame for failing to address issues that are well within its power to fix. But it is also important to emphasize that, even where the BOC cooperates, the arrangements for truly fair and nondiscriminatory access to OSS take time to develop. As explained in the attached affidavit of Melissa Closz, Director of Local Market Development for Sprint, it is unlikely that incumbents can provide nondiscriminatory access to OSS unless their OSS interfaces comply with national standards and have been stress-tested in the market.⁶⁶ Even if this turns out to be a time-consuming process, this Commission should not grant any Section 271 application before the industry has completed this work for all of the major OSS interfaces.

Thus, while the industry has adopted a national standard for ordering ("Electronic Data Interchange" or "EDI"), there are many other interface standards that remain to be established. For example, the industry is only now reaching consensus on standard pre-ordering interfaces. Until national standards are adopted for pre-ordering and a BOC develops its interface based on those standards, its pre-order interface is likely to be insufficient.⁶⁷ This is because national standard interfaces must generally meet the needs of all of the industry players. The standards are not adopted until closely scrutinized by both incumbents and their competitors. In contrast, the interim interfaces used by the BOCs, such as BellSouth's Local Exchange Navigation System ("LENS") pre-ordering interface, are often incomplete, flawed and promote inefficiency. Standard interfaces allow national CLECs to build out to a single interface, rather than to

⁶⁶ See Closz Aff. at ¶ 5 (App. C).

⁶⁷ BellSouth is currently developing a pre-ordering interface ("Application Programming Interface" or "API") based on the Common Object Request Brokering Architecture ("CORBA"), one of two standards that will likely be adopted by the industry.

numerous proprietary interfaces which can be changed at any time by the BOCs, making it much more difficult and expensive for CLECs to interconnect.

In reviewing the specific details relating to OSS raised by this and future Section 271 applications, the Commission must therefore keep in mind the broader point that non-discriminatory OSS access is highly unlikely to be available and widespread competition enabled before the major standard-setting work has been completed and stress testing in the market has been accomplished. Indeed, the FCC should urge BOCs to dedicate resources to completing these tasks rather than to filing premature Section 271 applications such as BellSouth's Louisiana application.

1. CLECs Still Cannot Integrate BellSouth's Pre-Ordering Interface With The CLECs' OSS Or With BellSouth's Ordering Interface.

In both the South Carolina Order and the Louisiana Order, the FCC found that the fundamental problem with LENS as a pre-ordering interface is that it is not a machine-to-machine interface.⁶⁸ This is still the case. As the FCC found, because it is not a machine-to-machine interface, LENS cannot be connected electronically to a CLEC's own OSS and it cannot be connected electronically to the separate EDI ordering interface.⁶⁹ This requires CLECs to copy information from LENS and manually reenter it into both the CLEC OSS and the EDI ordering interface. This inefficient process increases the risk of human error (and reject responses from BellSouth's OSS) and increases delays in response times for CLEC customer representatives.

⁶⁸ See Application by BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Louisiana, Memorandum Opinion and Order, 13 FCC Rcd 1245, at ¶¶ 49-52 (1998) ("Louisiana Order"); South Carolina Order at ¶¶ 155-59.

⁶⁹ See South Carolina Order at ¶ 152.

In contrast, BellSouth's own interfaces, RNS, SONGS and DOE, are all integrated with BellSouth's underlying legacy systems and are integrated for pre-ordering and ordering functions.⁷⁰ BellSouth's customer retail representatives are therefore not required to manually reenter information into the BellSouth OSS and into the BellSouth ordering interface. As a result, BellSouth has a substantially lower risk of human error and its retail representatives can complete transactions much more efficiently than CLEC representatives can.

BellSouth suggests three methods for integrating pre-ordering and ordering, none of which is feasible as a practical matter.⁷¹ First, BellSouth states that a CLEC could integrate pre-ordering and ordering functions using its own interface with EDI. But it would make no sense for a national CLEC to develop its own interface solely for the purpose of obtaining access to BellSouth pre-ordering functions. This is especially true since the industry is close to adopting a national standard for pre-ordering interfaces.

Second, BellSouth argues that a CLEC could use the Common Gateway Interface ("CGI") specification to integrate LENS and EDI.⁷² However, CGI does not present a realistic solution for integration of pre-ordering and ordering functions. As explained by Melissa Closz, since CGI is built to interface with LENS, the proprietary BellSouth pre-ordering interface, the investment in CGI cannot be justified for a national CLEC.⁷³

⁷⁰ See Stacy OSS Aff. at ¶ 77. BellSouth's other internal interface, EXACT, is used for access orders for which pre-ordering integration is not necessary.

⁷¹ See *id.* at ¶ 108.

⁷² See *id.*

⁷³ See Closz Aff. at ¶¶ 19-20.

Finally, BellSouth suggests that a CLEC could achieve integration by using CGI for both pre-ordering and ordering.⁷⁴ This approach suffers from the obvious problem that even BellSouth does not recommend CGI as the optimal interface for either pre-ordering or ordering. The limitations of CGI are clearly visible in the ordering context. For example, William Stacy, Vice President - Services for the Interconnection Department of BellSouth, states that a CLEC may not use CGI to make a resale service order on anything but a "switching-as-is" basis.⁷⁵ Moreover, CLECs may order a maximum of six lines via CGI.⁷⁶ If the CLEC wishes to order more than six lines or from a full set of services it must use EDI.⁷⁷

As to whether BellSouth offers a pre-ordering interface that can be integrated with the CLEC's OSS, EC-Lite, the interface developed by BellSouth with AT&T, does offer this capability.⁷⁸ But EC-Lite has been rejected as a national pre-ordering interface standard. It therefore makes no sense for a national CLEC, with a long term commitment to local entry, to waste money on integrating its OSS using EC-Lite.

In sum, BellSouth has not solved the two fundamental problems previously identified by the FCC with its pre-ordering interface: (1) it cannot, as a practical matter, be integrated with EDI; and (2) it cannot, as a practical matter, be integrated with a CLEC's own OSS.

⁷⁴ See Stacy OSS Aff. at ¶ 108.

⁷⁵ See id. at ¶ 98.

⁷⁶ See id.

⁷⁷ See id.

⁷⁸ See id. at ¶ 108.

2. BellSouth Has Not Fixed Other Problems The FCC Has Previously Identified With The Access It Provides CLECs To Pre-Ordering Functions.

In addition to the lack of electronic integration, there are numerous other problems with LENS access to the pre-ordering functions. For example, in the South Carolina Order, the FCC found that "LENS does not provide calculated due dates when used in the inquiry mode for pre-ordering."⁷⁹ While the inquiry mode requires CLEC representatives to calculate due dates manually, the FCC found that BellSouth's retail service representatives are provided "next-available due dates that are automatically calculated based on the services on a particular order, the work that must be performed, and the availability of the work force for the area."⁸⁰ Nor did the FCC agree with BellSouth that this violation of the parity requirement for OSS was resolved because CLECs using the firm order mode of LENS receive automatic due date calculations.⁸¹

BellSouth has not fixed this problem. BellSouth states that it will add the automatic due date calculation functionality to the inquiry mode of LENS by November 1998.⁸² In the

⁷⁹ See South Carolina Order at ¶ 171.

⁸⁰ See id.

⁸¹ The firm order mode of LENS is much more cumbersome than the inquiry mode for pre-ordering, especially where a CLEC uses EDI for ordering (as BellSouth recommends). See id. at ¶ 172 (explaining that CLECs using firm order mode of LENS pre-ordering and EDI for ordering must order service using LENS to obtain a due date and then cancel that order so that it can place the order via EDI). Thus, while a CLEC could use the firm order mode of LENS to obtain automatic due date calculation, the substantial problems associated with firm order LENS makes this proposal impractical.

⁸² See Stacy OSS Aff. at ¶ 62.

meantime, as a practical matter, only BellSouth retail service representatives will have this capability.⁸³

It is important to emphasize that the due date capability gives BellSouth customer representatives a significant advantage over their CLEC counterparts. The due date is probably the single most important piece of information a customer obtains from a carrier when discussing ordering service. If the CLEC representative cannot provide an accurate due date quickly to the customer, it will likely be perceived as less efficient. This is so notwithstanding the fact that the CLEC's inability to provide accurate due dates quickly over the phone has nothing to do with the efficiency of the CLEC.

And there are still other problems that BellSouth has not resolved. In the South Carolina Order, the FCC expressed concern regarding assertions that LENS requires CLECs to scroll through a lengthy list of available services and a random list of numerous long distance carriers to find the service or IXC specifically requested by a customer.⁸⁴ The Commission was concerned that BellSouth offered to its own retail operations the ability to search for specific services and IXCs requested by a customer.

In this proceeding, BellSouth has admitted that its own retail operations have the ability to search for services and IXCs specifically requested by a customer while no such capability is offered to CLECs. Specifically, William Stacy states that RNS allows BellSouth sales representatives to search for the PIC code of a specific IXC without the need to scroll through the

⁸³ See Yingling Aff. at ¶ 14.

⁸⁴ See South Carolina Order at ¶ 174.

entire random list.⁸⁵ No such capability will exist for LENS until December 1998.⁸⁶ Similarly, while RNS enables BellSouth retail representatives to search for a particular service, LENS includes no such capability.⁸⁷ As with due date calculation, this difference is likely to leave prospective customers with the impression that the BOC is more efficient than its competitors, even though the CLECs' level of efficiency is irrelevant to the problem.

3. BellSouth Has Not Fixed Problems The FCC Has Previously Identified With The Access It Provides CLECs To Ordering Functions.

There remain numerous obvious problems with BellSouth's ordering interface. First, in the South Carolina Order, the FCC found that, after a CLEC has received a Firm Order Confirmations ("FOC") notice with a due date for the CLEC's customer's service, "it is critical that the BOC provide the competing carrier with timely notice if the BOC, for any reason, can no longer meet that due date."⁸⁸ Because the FCC found that BellSouth failed to provide jeopardy notices for those delays caused by BellSouth (so-called "service jeopardies"),⁸⁹ the FCC held that BellSouth was not providing competing carriers with nondiscriminatory access to OSS ordering functions.⁹⁰ This problem still exists. William Stacy acknowledges that BellSouth provides

⁸⁵ See Stacy OSS Aff. at ¶ 46.

⁸⁶ See id.

⁸⁷ See id. at ¶ 47.

⁸⁸ See South Carolina Order at ¶ 130.

⁸⁹ BellSouth classifies jeopardy notices into two categories: "customer-caused" jeopardies (caused by some fault of the end user) and "service" jeopardies (caused by BellSouth). Id. at 9131.

⁹⁰ Id.

CLECs electronic notification for service jeopardies only for orders sent by the CLEC via LENS. Service jeopardies for orders sent by the CLEC via BellSouth's recommended ordering interface, EDI, are delivered to the CLEC manually.⁹¹ In contrast, BellSouth retail sales representatives apparently receive electronic notification of service jeopardies.⁹² As the FCC has found in many contexts, including specifically the delivery of jeopardy notices,⁹³ manual processing and delivery simply cannot provide the CLEC access to the incumbent's OSS on parity with the incumbent's own electronic access. Once again, therefore, BellSouth has apparently failed even to remedy the problems that have been clearly described in previous FCC Section 271 orders.

Second, in the South Carolina Order, the FCC expressed concern that competing carriers would face the same problems ordering UNEs through the EDI interface as they experienced with resale orders.⁹⁴ As detailed in the affidavit of Melissa Closz, use of BellSouth's OSS interfaces to order UNEs has proven unwieldy. For example, local loop orders placed through EDI require use of multiple OSS.⁹⁵ Use of multiple OSS imposes administrative and operational burdens on competing carriers and causes problems stemming from lack of integration. As such, BellSouth has failed to solve problems anticipated by the FCC in previous Section 271 orders.

⁹¹ See Stacy OSS Aff. at ¶ 149.

⁹² See Yingling Aff. at ¶ 28 (explaining that SOCS automatically delivers a jeopardy order to the customer service center in the event of a "Pending Facilities" status).

⁹³ See South Carolina Order at ¶ 131 n.392.

⁹⁴ See id. at ¶ 142.

⁹⁵ See Closz Aff. at ¶ 29.

Finally, in the South Carolina Order, the FCC expressed concern that, while BellSouth offered competitors UNE combinations, BellSouth did not seem to provide OSS functions to support ordering and provisioning of those combinations.⁹⁶ BellSouth continues to offer assembled UNE combinations,⁹⁷ but still has not attempted to provide CLECs with OSS functions to support ordering and provisioning of those combinations.⁹⁸ In this respect as well, therefore, BellSouth's OSS are deficient.

4. Sprint's CLEC Operation in Another BellSouth Territory Has Experienced Significant Problems with Ordering, Provisioning, Maintenance, and Billing of Network Elements.

Sprint operates as a CLEC in Orlando, Florida and has experienced numerous difficulties in ordering and provisioning UNEs from BellSouth as well as problems with maintenance and billing. As detailed in the affidavit of Melissa Closz, BellSouth consistently has failed to meet its commitments to return FOCs to Sprint within 48 hours of receipt of an order.⁹⁹ In addition, BellSouth has failed to provide Sprint with timely notice of installation problems which, in turn, has prevented Sprint from meeting its due date commitments to customers.¹⁰⁰ Sprint has also experienced significant problems with call routing,¹⁰¹ notification of customer migration,¹⁰² service

⁹⁶ See South Carolina Order at ¶ 146.

⁹⁷ See BellSouth Br. at 39; Varner Aff. at ¶ 68.

⁹⁸ See Stacy OSS Aff. at ¶¶ 100-103.

⁹⁹ See Closz Aff. at ¶ 56.

¹⁰⁰ See id. at ¶¶ 59-60 (noting that in 1998, 74% of Sprint's customer desired due date misses were attributable to BellSouth).

¹⁰¹ See id. at ¶¶ 63-65.

¹⁰² See id. at ¶¶ 66-71.

conversion,¹⁰³ and maintenance.¹⁰⁴ In her affidavit, Melissa Closz states that "[i]n nearly two years of doing business as a CLEC in Florida, Sprint has not yet received correct billing from BellSouth for any month."¹⁰⁵ These problems, and numerous others described in more detail in Melissa Closz's affidavit, demonstrate that BellSouth has not satisfied its obligation to provide access to OSS under Section 271.

B. BellSouth's Proposed Performance Measures Are Insufficient To Determine Whether It Provides Service To Competitors That Is At Parity With The Service It Provides Its Own Customers.

As explained in the affidavit of Melissa Closz, uniform national performance measures are critical to Sprint's ability to enter and compete in the local market. Uniform, national measurement categories and methodologies, including uniform definitions and calculations, allow CLECs and regulators to determine whether the BOC provides service to CLECs that is at parity with the service it provides its customers or, where no BOC retail analog exists, is sufficient to allow CLECs to compete.

Sprint urges the FCC to adopt the measurement categories and methodologies developed by the Local Competition Users Group ("LCUG"). Alternatively, Sprint supports the adoption of the performance measures (based largely on the LCUG proposals) tentatively adopted by the FCC in its performance measurement and reporting proceeding,¹⁰⁶ subject to the modifications Sprint

¹⁰³ See id. at ¶¶ 73-74.

¹⁰⁴ See id. at ¶¶ 77-80.

¹⁰⁵ Id. at ¶ 81.

¹⁰⁶ See Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance, CC Dkt. No. 98-56, RM-9101, *Notice of Proposed Rulemaking* (rel. Apr. 17, 1998).

suggested in its Comments in that proceeding.¹⁰⁷ All Section 271 applicants should be required to report on all the relevant categories of information. Such comprehensive, uniform reporting will permit efficient and straightforward assessment of the service provided by a BOC to its competitors (which is especially helpful given the 90 day limit for review of Section 271 applications). National rules will also permit helpful comparisons between BOCs and between different Section 271 applications filed by the same BOC.

The performance measures used by BellSouth in the instant application illustrate the need for uniform, national rules for performance measures. BellSouth's proposed measures follow neither the LCUG measures, the measures proposed by the FCC in its performance measure proceeding, nor even the performance measures adopted by the Georgia Public Service Commission. Instead, BellSouth has used a hybrid approach that includes aspects of all of these approaches. As a result, it is difficult to determine exactly what BellSouth has reported, and

¹⁰⁷ See Comments and Reply Comments of Sprint Corporation filed in CC Docket No. 98-56, RM 9101. In its Comments, Sprint suggested the following minor modifications to the FCC's proposed performance measures: (1) orders for unbundled loops should not be disaggregated according to whether the loops are provisioned with interim number portability; (2) the Average Completion Interval measure should be eliminated; (3) the Percentage of Due Dates Missed measure should be modified to measure the percentage of due dates met; (4) troubles should be reported on a per circuit, rather than a per order, basis; (5) the National Emergency Number Association data quality measurements should be adopted for 911 data; (6) the Average Time to Provide Usage Records measure should be disaggregated according to "end user" and "access usage" categories only; and (7) where established, tariff timelines should govern whether collocation due dates have been missed. See Comments at 8-10. In addition, Sprint commented on the reporting requirements and procedures proposed by the Commission. See Comments at 5-7, 11-12. In its Reply Comments, Sprint stated that it was in the process of developing, with other members of LCUG, measures relating to network interconnection. These proposed measures are consistent with the FCC's proposals with one exception: database updates should be measured for line information and directory assistance databases, as well as for 911/E911 databases. See Reply Comments at 8.

virtually impossible in many cases to compare BellSouth's performance with the performance of carriers that have used different measures. Indeed, the Louisiana Commission accepted the BellSouth performance measures only as interim subject to its proceeding on permanent performance measures.¹⁰⁸ Thus, the performance measures used by BellSouth could well change in Louisiana.

Moreover, while BellSouth has included a substantial amount of material in its application on performance measures, this information does not permit a full assessment of whether BellSouth provides service to CLECs on a par with the service it provides its own customers. For example, BellSouth has not provided complete data for each of the performance measure categories provided in Exhibit SQM to Mr. Stacy's Affidavit. As detailed in Melissa Closz's affidavit, there are some measures for which data are provided for some months but not others.¹⁰⁹ Moreover, BellSouth has not provided any data at all for some performance measures, such the Average Completion Notice Interval.¹¹⁰ In addition, by providing data at a state or regional level only, BellSouth has failed to sufficiently disaggregate the data. As shown in Melissa Closz's affidavit, statewide or regional reporting can mask discrimination.¹¹¹ BellSouth has also failed to provide for the use of statistical models to evaluate parity¹¹² and benchmark standards to which

¹⁰⁸ See BellSouth Telecommunications, Inc. Service Quality Performance Measurements, CC Dkt. U-22252-Subdocket C, Notice (LPSC June 19, 1998) (soliciting comments concerning whether to "adopt, amend, supplement or reject the Proposed Measurements and Standards as filed by BellSouth").

¹⁰⁹ See Closz Aff. at ¶ 34.

¹¹⁰ See *id.* at ¶ 35.

¹¹¹ See *id.* at ¶ 36.

¹¹² See *id.* at ¶¶ 40-41.

measures with no retail analogs can be compared.¹¹³ As such, BellSouth has not provided sufficient data with which to evaluate whether it has met its obligations to provide access to OSS that is nondiscriminatory and on par with the access it provides to itself. In sum, substantial work needs to be done before BellSouth's performance measures can be deemed to satisfy its obligations under Section 271.

C. BellSouth Imposes Unlawful Conditions On Resellers.

The ability to resell certain of BellSouth's retail services remains in doubt on this record. First, BellSouth has not been forthcoming as to whether contract service arrangements ("CSAs") are resellable to users other than BellSouth's original customer of record. Second, the LPSC has not finalized a distinct wholesale discount for resellers that provide their own operator services (and thus for whom BellSouth's "avoided costs" are materially different).

1. BellSouth Appears to Continue to Place Unlawful Restrictions On The Resale Of Contract Service Arrangements.

Though BellSouth asserts generally that its "contract service arrangements are now available for resale in Louisiana," BellSouth remains noticeably silent on the crucial issue of whether a reseller may market an existing CSA to a different customer. In the prior Louisiana application, BellSouth took the position that CSAs could be offered only to the BellSouth customer for whom the CSA was originally established. Neither BellSouth's current brief nor the LPSC's decision approving BellSouth's modification to its SGAT state or suggest that BellSouth has changed its position in this regard. To the extent BellSouth adheres to this clearly unlawful position in Louisiana, the Commission should reject BellSouth's application.

¹¹³ See id. at ¶¶ 42-44.

The Commission has stated -- and BellSouth concurred in its current Louisiana brief -- that the obligation to provide all telecommunications services for resale at a wholesale discount requires that ILECs offer contract arrangements, including volume-based discounts, at wholesale discounts.¹¹⁴ The Commission has also indicated it is unreasonable for ILECs to restrict the resale of volume discount offerings to the customer for whom the ILEC designed the offering.¹¹⁵ By insisting in its prior Louisiana brief that CSAs be offered only to the BellSouth customers for whom the CSA was originally established,¹¹⁶ BellSouth openly violated the resale checklist requirement. In this iteration, BellSouth elected not to address the issue either at the state level or in its current Louisiana brief, leaving open the possibility that BellSouth still holds this position.

The Eighth Circuit has acknowledged that the FCC has the exclusive jurisdiction under Section 251(c)(4)(B) to establish rules to prevent discriminatory conditions on resale.¹¹⁷ The Commission adopted its rules governing the resale of CSAs pursuant to Section 251(c)(4)(B).¹¹⁸ That provision leaves it to the Commission, not the states, to determine whether ILECs must apply the resale discount to CSAs.

¹¹⁴ See Local Competition Order at ¶¶ 948, 951.

¹¹⁵ See id. at ¶¶ 953, 964.

¹¹⁶ BellSouth First Br. at 67 n.43. In addition, BellSouth did not make any CSAs into which it entered on or before January 28, 1997 available for resale. See Varner Aff. at ¶ 184 (filed with BellSouth First Br.).

¹¹⁷ See 47 U.S.C. § 251(c)(4)(B); Iowa Utils. Bd. v. FCC, 120 F.3d 753, 794 n.10 (8th Cir. 1997).

¹¹⁸ See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, at ¶¶ 951-953 ("Local Competition Order"). The Commission recognized that there may also be reasonable restrictions, and left these issues for the states. For example, restrictions on ICBs raise distinct issues, not raised here.

Though it is unnecessary to reiterate the arguments for the limitation BellSouth advanced in its prior Louisiana brief, it is important to recognize that BellSouth has advanced those same arguments in other contexts in recent weeks. For instance, the United States District Court for the Eastern District of North Carolina considered BellSouth's arguments on this point recently in AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications Inc., et al., No. 5:97-CV-405-BR (E.D.N.C. May 22, 1998) ("AT&T of Southern States"). The Court rejected BellSouth's argument that the end-user limitation falls under the cross-class resale exception of Section 251(c)(4)(B), stating "BellSouth's contention that a single consumer should be able to qualify as 'a category of subscribers' triggers considerable skepticism."¹¹⁹ This case is important for its substantive ruling. More importantly, however, it demonstrates that BellSouth has held this view as recently as late May -- three months after the FCC's first Louisiana decision, and only weeks prior to the filing of the current Louisiana application.¹²⁰ The Commission should regard BellSouth's current silence on this issue with suspicion, and cannot approve BellSouth's compliance with checklist item (xiv) until BellSouth makes clear its position.

¹¹⁹ AT&T of Southern States at 29.

¹²⁰ It appears BellSouth has convinced Alabama state regulators to side with its position as well. See, e.g., General Local Resale Docket Before Alabama PSC, Dkt. No. 25677, Order on Reconsideration (dated Apr. 10, 1998) ("[The APSC] intent is that all existing and subsequently effective CSAs be made available for resale at the wholesale discount rate to the customer for whom the CSA is applicable. We find this position to be the most consistent with the Telecommunications Act of 1996 and the implementing regulations of the FCC.").

2. **BellSouth Discriminates Unlawfully Against Resellers That Provide Operator Services.**

In the LPSC's resale proceeding, several CLECs stated that they planned to provide resale in combination with their own operator services.¹²¹ The LPSC acknowledged that "[i]t may be appropriate to have an additional discount available for companies that provide their own operators,"¹²² and sought further comment on the issue. While the LPSC is in the process of considering this critical issue, BellSouth filed its Section 271 application with the FCC.

Until the LPSC has adopted a resale discount applicable to resellers that provide their own operator services, those resellers will be subject to unreasonably discriminatory treatment in violation of Section 251(c)(4)(B). The wholesale discount applicable to a certain carrier must include all of the costs that the ILEC avoids when it provides a retail service on a wholesale basis.¹²³ A class of resellers (and their customers) to whom this principle is not applied suffers unlawful discrimination. Until the LPSC is given a chance to rectify this problem, BellSouth cannot be considered to have complied with the resale checklist requirement.

D. **BellSouth Fails to Permit CLECs Access to Network Elements In Accordance with Sections 271(c)(2)(B)(ii) and 251(c)(3).**

Section 271(c)(2)(B)(ii) requires BellSouth to provide "nondiscriminatory access to network elements in accordance with the requirements of Sections 251(c)(3) and 252(d)(1)."¹²⁴

¹²¹ See LPSC Resale Order at App. C-4 Tab 329 p. 14.

¹²² Id.

¹²³ While Sprint believes that the Supreme Court's review of the Eighth Circuit's decisions in Iowa Utilities will reaffirm that this is a matter well within the FCC's jurisdiction, the legal issue need not be reached here since the LPSC apparently believes its own authority under the Act requires the application of separate discount here.

¹²⁴ 47 U.S.C. § 271(c)(2)(B)(ii).

Section 251(c)(3) imposes the requirement that BellSouth do so at any "technically feasible point" in a just, reasonable and non-discriminatory manner, and in a way that permits CLECs to combine UNEs.¹²⁵ At present in Louisiana, BellSouth only permits CLECs to combine UNEs via the costly and time consuming methods of physical or virtual collocation¹²⁶ -- this is inconsistent with the applicable standards, and therefore BellSouth fails to satisfy this checklist item.

In the South Carolina Order, the Commission stated that it was "still evaluating" the impact of the Eighth Circuit's ruling on whether it could require "methods other than or in addition to collocation for combining network elements."¹²⁷ The Commission has yet to reach a conclusion. In the interim, AT&T has offered three alternative arrangements which it discusses at length in its March 20, 1998 ex parte filing. These arrangements consist of: (1) the "recent change" process consisting of combination of UNEs via OSS software; (2) third party access to main distribution frame; or (3) an electronic cross connection system which has yet to be developed.¹²⁸

¹²⁵ See 47 U.S.C. § 251(c)(3). As discussed supra at 25-26, we leave for another time any discussion of implications of the 8th Circuit's mandamus order on the 252(d) element of this checklist item.

¹²⁶ See BellSouth Br. at 40; Varner Aff. at ¶ 63 ("BellSouth provides CLECs that so desire with physical or, at the CLEC's option, virtual collocation for the purpose of combining UNEs."). Though the Milner affidavit seemingly suggests that BellSouth does not limit CLEC access to UNEs by a collocation requirement, BellSouth fails to offer any other acceptable methods. See Milner Aff. at ¶ 39 ("One method by which a CLEC may recombine UNEs is through the use of collocation arrangements.")

¹²⁷ See South Carolina Order at ¶ 199.

¹²⁸ See AT&T Ex Parte, submitting "The Incumbent LEC's Duty to Permit New Entrants to Combine Unbundled Network Elements At Any Technically Feasible Point" (filed Mar. 20, 1998) (AT&T Paper)

BellSouth appears fully prepared to dispute any attempts to expand its obligation beyond the provision of physical or virtual collocation.¹²⁹ BellSouth raises multiple concerns with respect to the first two alternatives suggested by AT&T.¹³⁰ BellSouth stops short of denying CLECs the opportunity to pursue AT&T's third proposed alternative, but this may largely be due to the fact that "AT&T's third proposal is the use of a not yet invented electronic cross connection system"¹³¹ BellSouth has decided to use its resources to deny the feasibility of those access options which present the greatest promise for CLECs. The Commission should not be surprised to see BellSouth vigorously deny CLECs the opportunity to use the third proposal once it becomes a viable option.

As to the methods BellSouth does permit -- physical and virtual collocation -- BellSouth has been equally adamant in ensuring that CLECs do not receive non-discriminatory access on just and reasonable terms. First, these methods of collocation have substantial cost burdens associated with them which create a barrier to competitive entry.¹³² In addition, the unreasonable delays associated with physical collocation make it a questionable proposition for CLECs to enter the market through this method.¹³³

¹²⁹ See BellSouth Br. at 40-41; Milner Aff. at ¶¶ 39-49. In the AT&T Paper, AT&T sets forth a detailed legal analysis of its proposals, the impact of the Iowa Board decision, and a rebuttal of the BOCs' arguments.

¹³⁰ See Milner Aff. at ¶¶ 41-43.

¹³¹ Milner Aff. at ¶ 44.

¹³² See BellSouth Louisiana SGAT at Att. A, p. 1.

¹³³ For instance, Bell Atlantic has been able to meet a 76-day interval for provisioning physical collocation arrangements. See Supplemental Petition of Bell Atlantic-New York, Case 97-C-0271 at 22 (filed with NYPSC Nov. 6, 1997); compare Tipton Aff. at ¶ 27 ("In

Finally, BellSouth has been less than forthcoming with respect to its position on CLEC combination of UNEs on an end-to-end basis. Although BellSouth's SGAT permits CLECs to recombine UNEs to provide end user services, it appears that BellSouth nevertheless insists that the rates for resold services apply (and presumably access revenues denied) even where UNEs are combined by the CLEC to provide end user services.

In a letter to Melissa Closz, Sprint Communications Company L.P.'s Director-Local Market Development, BellSouth stated as follows:

[W]hen Sprint Communications orders a combination of UNEs or orders individual UNEs that, when combined, duplicate a retail service, BellSouth will treat these orders for the purposes of billing and provisioning, as resale.¹³⁴

Absent any explicit adjustment by BellSouth, the fair inference to be drawn is that BellSouth has not altered its unlawful position.

There is of course no legal basis for BellSouth's position on recombined UNEs.

Subsection 251(c)(3) allows "any requesting telecommunications carrier" to lease UNEs to

Louisiana, BellSouth's average installation interval for Physical Collocation is 117 days.") (citing Milner Aff. at Ex. WKM-2). BellSouth's standard service interval is 120 days.

¹³⁴ See Letter from Pat Finlen, BellSouth Telecommunications, Inc. Manager, Interconnection Services to Melissa Closz, Sprint Communications L.P.'s Director, Local Market Development (Nov. 4, 1997). The letter was submitted by Sprint to the Commission in its Petition to Deny the first BellSouth-Louisiana application.

The BellSouth-AT&T interconnection agreement contains a similar restriction. See BellSouth-AT&T Interconnection Agreement at 1.A ("When AT&T recombines unbundled Network Elements to create services identical to BellSouth's retail offerings, the prices charged to AT&T for the rebundled services shall be computed at BellSouth's retail price less the wholesale discount established by the Louisiana Public Service Commission in Order U-22020 or any future modifications thereof and offered under the same terms and conditions as BellSouth offers the service").